Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

JAYANTI S. PATEL

Petitioner

v.

THE CITY OF EVERMAN
AND
TOM KILLEBREW

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a showing of disparate treatment of an individual, with or without other evidence of discriminatory intent, sufficient for a ***prima facie*** case of intentional racial discrimination in the context of "official action" discrimination?

2. Is the "burden-shifting" paradigm of *McDonnell Douglas v. Green* appropriate for evaluating circumstantial evidence of racial discrimination in the context of official action discrimination (i.e. outside the context of employment discrimination)

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OPINIONS BELOW AND JURISDICTION

This petition is from the judgment of the United States Court of Appeals for the Fifth Circuit dated October 17, 2001 (both opinion and judgment). That decision is not officially reported, but is unofficially reported at 2001 U.S. App. LEXIS 23374 and is reproduced in the Appendix. (A1). The court of appeals had jurisdiction under Sections 1291 and 1294 of the Judicial Code, 28 U.S.C. §§ 1291 and 1294.

The opinion of the Fifth Circuit summarily affirmed the judgment of the United States District Court for the Northern District of Texas rendered and filed on January 3, 2001. That decision is not officially reported, but is unofficially reported at 2001 U.S. Dist. LEXIS 34 and is reproduced in the Appendix. (A10). The district court had subject matter jurisdiction under Sections 1331 and 1343 of the Judicial Code, 28 U.S.C. §§ 1331 and 1343.

The district court granted summary judgment in favor of the Defendants, City of Everman and Tom Killebrew, who are Respondents herein. Petitioner Jayanti Patel timely appealed that decision to the Fifth Circuit.

Certiorari is sought under Section 1254 (1) of the Judicial Code, 28 U.S.C. § 1254 (1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes, constitutional provisions, and rules involved are reproduced in the Appendix. The "Equal Protection Clause" of the Fourteenth Amendment to the United States Constitution (A 13), Section 1983 of the "Reconstruction Civil Rights Act" of 1871 (A14), and Rule 56 of the Federal Rules of Civil Procedure (A 15), are the constitutional provisions, statutes, and court rules involved in this petition.

STATEMENT OF THE CASE

Petitioner Jayanti Patel is of Indian origin. Until 1998, he owned 20 "fourplex" (four units per building) apartment buildings in the City of Everman, Texas. The apartments were primarily lower income housing. Don Butler and Robert Trietsch are white and own near-identical buildings (in age, construction, and condition) interspersed among Patel's 20 properties.[1] Patel's buildings were valued for lending purposes at upward of $90,000 each in 1997.

In May 1998, Respondent the City of Everman demolished 16 of Patel's buildings. Butler and Trietsch's buildings are standing today. The remaining four of Patel's buildings were foreclosed upon by banks holding liens on the properties because of the demolition threatened by the City.[2] Two of those buildings, now owned by a white man, stand today. The foreclosing lender sold the other two buildings to the City, which demolished them also.

The City claimed these buildings were "substandard," citing "shingles falling off roof," "door knob missing," and "building not rat proof." On the basis of these "serious" and "dangerous" defects, the City ordered Patel's buildings demolished. The City could not and did not cite to serious deficiencies that reflect true hazards to the public, e.g. structural deficiencies, vermin infestation, lack of sanitation. The City's "substandard building reports" are startlingly similar (nearly identical) for each of Patel's 20 buildings.

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[1] Butler, Patel, and Trietsch owned the 27 buildings comprising the "Willow Wood Apartments."

[2] Each of the two lenders filed suit against Patel (for foreclosure) and the City (for injunctive relief). The City agreed to forego demolition while the lenders foreclosed, resulting in Patel's loss of ownership of these four properties.

The City of Everman thus deprived Patel of his ownership of 20 buildings, worth approximately $90,000 apiece by some estimates. In stark contrast, white owners of virtually identical properties, even those formerly owned by Patel, are still in possession of these buildings, and those buildings still stand.

In 1998, immediately prior to the demolition, the City, among other unusual and unprecedented steps:

- enacted a new Substandard Building Ordinance
- hired an independent-contractor "code enforcement official" to enforce the Ordinance against Patel and his property

The independent "code enforcement official" was Respondent Tom Killebrew.

This extraordinary effort was the culmination of a year-long-campaign by the City to demolish Patel's properties. This campaign included court action between Patel and the City in Texas state court some six months prior to demolition.[3] No other property owner in the history of the City has been subjected to the level of effort expended on Patel. Indeed, no other property owner has had their building involuntarily demolished by the City. To the City, the end justified the means, and the end was the destruction of Patel's property.

In January 1998, the City met with and ultimately hired Mr. Killebrew. During a meeting between Killebrew and City officials, a city council member ridiculed Patel's accent, mocking his pronunciation of "pitch roof." At the same meeting, Killebrew and various city officials joked about a "weenie roast" after Patel's property was demolished.

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[3] Patel sought and obtained a six-month injunction against enforcement activities by the City. Upon expiration of that injunction on February 9, 1998, the City only redoubled its efforts, as indicated above.

After the March 1998 City of Everman Building Board of Appeals meeting at which demolition of Patel's properties was ordered, a member of that body referred to the "American way" of doing things.[4]

Patel sued the City and Killebrew for taking of his property under the Texas and United States Constitutions, violations of the Due Process Clause of the United States Constitution, and for racial discrimination and denial of Equal Protection under the United States Constitution.[5]

The takings claims were dismissed by the district court because they were unripe under the doctrine of *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

Before trial, the City moved for summary judgment, arguing essentially that Patel had no evidence of racially discriminatory motive behind the City's actions and that the demolition of Patel's property was the result of "even-handed" application of the new ordinance by the new official, Killebrew.

Patel responded with evidence showing that he was treated differently than near-identically situated white men Butler and Trietsch and that the City's actions under its substandard building ordinance were a pretext for the racial motivation of the City, acting through its City Council and Building Board of Appeals. The City also objected to much of Patel's summary judgment evidence, primarily on formal grounds.

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[4] The Building Board of Appeals was created by the ordinance enacted by the City of Everman as part of the new substandard building ordinance on February 5, 1998.

[5] Patel originally filed his suit in Texas state court. After a potentially case-ending mistake pertaining to service of a response to a motion for summary judgment, that suit was voluntarily dismissed by Patel. Patel brought the same causes of action in the case below. The takings claims are now pending in Texas state court.

The district court granted summary judgment on January 3, 2001, excluding some of Patel's summary judgment evidence. The ruling disposed of all of Patel's claims. (Appendix A3).

Patel appealed this ruling to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the grant of summary judgment, stating that it considered the evidence excluded by the district court, but reached the same conclusion: that Patel had not offered sufficier ' evidence to support his claim of official racial discrimination on the part of the City. (Appendix A1). Both the Fifth Circuit and district court decisions cite only to *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.* in support of their holdings on the evidence of racial discrimination. (Appendix A2, A10).

SUMMARY OF ARGUMENT

Petitioner Jayanti Patel's claim of race discrimination arises because of the application by Respondent the City of Everman of an otherwise or facially neutral substandard building ordinance to demolish his property, while leaving the nearly identical properties of white owners untouched. Accordingly, it is an "official action" action case alleging violation of Patel's right to be free from discrimination on the basis of race or national origin under the Equal Protection Clause of the U.S. Constitution, made actionable under 42 U.S.C. § 1983.

On the City's motion for summary judgment, the district court applied *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.* to find that Patel did not produce sufficient evidence of racial discrimination, apparently relying on the principle that evidence of disparate impact is not adequate evidence of racial motivation.

The decision in *Arlington Heights* fails to distinguish between allegations of disparate treatment, such as Patel's, where the fact of disparate treatment can infer the required discriminatory intent, from allegations of disparate impact, where statistics showing disparate treatment of a group generally are held insufficient to infer discriminatory motive.

The *Arlington Heights* decision is nearly 25 years old and has not been revisited by this Court or refined by the lower courts, unlike other types of discrimination cases or contexts, e.g. employment and jury- selection. Moreover, *Arlington Heights* fails to delineate a *prima facie* case for the official action plaintiff, despite making reference to the burden shifting to the defendant, as in employment discrimination cases.

Employment discrimination cases under Title VII and § 1983 have developed a *prima facie* burden of proof for the plaintiff and a burden-shifting analysis that seems appropriate

for application in the context of official action cases such as this. The purposes of Title VII and the Equal Protection Clauses are similar, as are the standards applied and there seems to be no valid reason to distinguish the genres where the allegations are of disparate treatment rather than disparate impact.

Accordingly, in disparate treatment official action cases, Petitioner Patel submits that the standards of Title VII cases such as *McDonnell Douglas, Burdine,* and *Reeves v. Sanderson Plumbing* can and should be applied, with appropriate variation, to cases such as this one.

Applying such standards and properly applying the summary judgment standard, Petitioner Patel would have prevailed on summary judgment and had the opportunity to develop fully his circumstantial evidence of discriminatory motive and to test the credibility of the City's non-discriminatory pretext. Accordingly, this case provides an important opportunity for the Court to clarify this important area of the law.

ARGUMENT

Patel's claim of race discrimination[6] arises because of the application by a municipality of an otherwise or facially neutral substandard building ordinance.[7] Thus, the case below is one of race discrimination in the "official action" context. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

The courts below (both the district court and court of appeals) applied *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) to find that Patel did not produce sufficient evidence of racial discrimination to "survive" a motion for summary judgment, apparently relying on the principle that evidence of disparate impact is not adequate evidence of racial motivation. (Appendix A2, A10).

The decision in *Arlington Heights* has not been significantly revisited by this Court and has not been the subject of development or elucidation by the lower courts. As a result, the contours of a *prima facie* case are murky and lower courts are left to an *ad hoc,* amorphous analysis of circumstantial or indirect evidence of discriminatory intent, particularly at the intermediate stage of litigation at summary judgment.

I. *Arlington Heights*, Burden Shifting and the Need for A Clear Prima Facie Case

As can be noted from the decisions in the courts below,

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[6] More precisely, violation of the guarantees of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, made actionable by 42 U.S.C. § 1983 (2000).

[7] Which ordinance was enacted just prior to the citation and demolition of Patel's properties in 1998, leaving the inescapable conclusion that the ordinance was enacted specifically to address Patel's properties.

Arlington Heights is the seminal case when government, municipal, or other "official" action results in a claim of race discrimination.

A. The Holdings of *Arlington Heights*

1. Proof of Disparate Racial Impact Is Insufficient to Prove Violation of Equal Protection

Arlington Heights establishes the following principles or points relevant to proof of official action discrimination claims:

- *Washington v. Davis*[8] made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination."
- Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.
- *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes.

Arlington Heights, 429 U.S. 252, 267.

The foregoing propositions give some guidance for the treatment of official action discrimination claims, but not as much as could be desired. What *Arlington Heights* fails to do is provide the contours of the *prima facie* case.

2. The Role of Circumstantial Evidence

From the foregoing, it is abundantly clear that proof of intentional discrimination is required to prove a violation of the Equal Protection Clause by official action. As noted by this Court and others, those who discriminate are not likely to

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[8] 426 U.S. 229 (1976).

announce their discriminatory motivations,[9] leaving plaintiffs to rely on circumstantial evidence to prove that a defendant was motivated by race.

To this end, *Arlington Heights* refers to a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. 252, 266. The reference in the conjunctive instead of the disjunctive does not literally resolve the question whether circumstantial evidence alone can make a ***prima facie*** case, or a case that will support a jury verdict. The question appears to remain open.

Arlington Heights further provides a framework for the "sensitive analysis," indicating the following factors are a non-exhaustive list of considerations:

- The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.
- The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes.
- Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.
- Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.
- The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the

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[9] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 534-535 (1993) (Souter, J. dissenting); *see also Contreras v. City of Chicago,* 119 F.3d 1286, 1294 (7th Cir. 1997).

decisionmaking body, minutes of its meetings, or reports.

Arlington Heights, 429 U.S. 252, 266-267.

These factors appear to contemplate the use of circumstantial evidence to prove the plaintiff's case. *See Hunt v. Cromartie,* 526 U.S. 541, 548-549 (2000); *Pullman-Standard v. Swint*, 456 U.S. 273, 298 (1982) (Marshall, J. dissenting); *U.S. v. Clary*, 34 F.3d 709, 711 (8th Cir. 1994) (labeling the foregoing factors "circumstantial" evidence of intent). Several courts of appeals have construed these factors as circumstantial and *Arlington Heights* as permitting proof by circumstantial evidence alone.[10]

In Title VII employment cases, it is accepted that a case may be proven solely with circumstantial evidence. *See, e.g., Reeves v. Sanderson Plumbing Co., Inc.,* 530 U.S. 133 (2000); *Aikens*, 460 U.S. 711, 715 n. 3; *Teamsters*, 431 U.S. 324, 358 n. 44. This is consistent with evidence law when intent is at issue (as it clearly is in all discrimination cases).[11]

Due to the difficulty of proving intentional discrimination by the use of circumstantial evidence, in the more common employment discrimination context, the well-known *McDonnell Douglas*[12] burden-shifting analysis has

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[10] *Southside Fair Housing Comm. v. New York*, 928 F.2d 1336, 1354 (2d. Cir 1991) (appearing to recognize circumstantial evidence sufficient); *Nevett v. Sides*, 571 F.2d 209, 222-223 n. 22 (5th Cir. 1978) (circumstantial evidence adequate); *Contreras v. City of Chicago*, 119 F.3d 1286, 1294 (7th Cir. 1997); *Dowell v. Bd. of Educ.*, 890 F.2d 1483, 1503 (10th Cir. 1989); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1193 (11th Cir. 1993).

[11] "We have noted in other contexts that no one has a window to a man's mind; hence, intent must often be proved by indirect evidence." *U.S. v. Jones*, 648 F.2d 215, 217 (5th Cir 1981 [Unit B]).

[12] 411 U.S. 792 (1973).

developed "to bring the litigants and the court expeditiously and fairly to" the ultimate question, which is whether the defendant intentionally discriminated against the plaintiff. *Texas Dept. of Comm. Affairs v. Burdine,* 450 U.S. 248, 253 (1981). This same analysis is employed in constitutionally based challenges to employment discrimination under the Fourteenth Amendment and § 1983. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 n.1 (1993).

Because official action cases have yet to develop to the extent of employment discrimination cases, there is a need for clarification of the *prima facie* case for proof of denial of equal protection in the context of discriminatory official acts.

B. Comparing Disparate Impact and Disparate Treatment

Of the foregoing, the proposition for which *Arlington Heights* seems most often cited is that employed by the district court in this case: "Official action will not be held unconstitutional solely because it has a racially disproportionate impact." (Appendix A10).

While this statement is no doubt true (or an accurate statement of the holding of this Court in *Arlington Heights* and earlier in *Davis*), in many cases and in the case below, it equates disparate impact with disparate treatment. Indeed, *Arlington Heights*, confined to its facts, is solely a *disparate impact* case and is of little or no assistance in divining the contours of a *prima facie* case for disparate treatment cases.

The distinction between disparate impact and disparate treatment cases is well drawn. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (considering disparate impact and employment qualifications); and *McDonnell Douglas*, 411 U.S. 792, 802 , n. 14. (establishing burden-shifting analysis in employment claims of disparate treatment).

In any discrimination case, the gravamen is that the

complainant has been treated differently than another, similarly situated, party or group. The factual inquiry in a discrimination case is whether the defendant intentionally discriminated against the plaintiff. *U.S. Postal Serv. Bd. Of Gov. v. Aikens*, 460 U.S. 711, 731 (1983); *Burdine*, 450 U.S. 248, 253. Nevertheless, a distinction has evolved in the type of proof required for claims alleging disparate impact versus those of disparate treatment, at least for the *prima facie* case.

1. Disparate Impact

Disparate impact occurs when an entire *group* is treated differently from another group, usually on the basis of a facially neutral law or ordinance. *See, e.g., Personnel Admin. of Mass. v. Feeney,* 442 U.S. 256, 273-274 (1979). The proof, because it relates to a group, is usually statistical in nature (i.e. "X group" is treated differently than "Y group" under this statute, as shown by the statistics). *Feeney*, 442 U.S. 256, 273-274. This was the case in *Arlington Heights,* in which the plaintiffs were individuals and a charitable corporation protesting a racially motivated zoning decision.[13]

In disparate impact cases, statistical evidence of discriminatory effect or impact may be the only evidence of discrimination. *McCleskey* v. *Kemp,* 481 U.S. 279, 280 (1986); *Teamsters v. United States*, 431 U.S. 324, 338-340 ("we have repeatedly approved the use of statistical proof . . . .). *Arlington Heights* makes clear that, in the usual case, this evidence alone is inadequate to support an invidious racial discrimination claim that violates the Equal Protection Clause,

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[13] In *Arlington Heights*, the tenuousness of the harm to any individual in that case was such that a serious question as to the standing of the Plaintiffs was before the Court.

at least in the official action context.[14] Again, however, *Arlington Heights* is silent as to the *prima facie* case of invidious discrimination required of plaintiffs at the intermediate stages of litigation.

Because the harm or injury is inflicted on a group, rather than any particular individual, and the accused official body is also a group considering many factors, permissible and otherwise, apparently it is too tenuous to infer the unlawful purpose merely from the effect achieved by the official action. *See, e.g., McCleskey*, 481 U.S. 279, 294-298 (discussing infirmities of statistical evidence in inferring the cause from the result).

One evidentiary difficulty with the use of statistical evidence as proof of intentional discrimination, in addition to the causal inference problem described above, is that the defendant has no meaningful opportunity or ability to "explain" the disparity on neutral or non-discriminatory grounds because so many factors, circumstances, and occurrences enter into the statistical analysis. *McCleskey,* 481 U.S. 280-281. This is implicitly recognized in the holdings of *Davis* and *Arlington Heights* where proof of impact alone, with its diffuse causes and effects, is not enough.

2. Disparate Treatment

Disparate treatment, on the other hand, occurs when an ***individual*** is treated differently because of his race, national origin, sex, or another impermissible criterion. Such disparate treatment claims arise most often in the context of employment

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[14] In most Title VII cases, proof of purposeful discrimination is also required. There are statutory exceptions, notably for qualification tests, where proof of disparate ***impact*** alone may support a claim of racial discrimination. 42 U.S.C. § 2000e-2(k). That provision specifies the burden of proof applicable to such cases.

discrimination claims, in the private sector under Title VII, 42 U.S.C. § 2000e *et seq.* and in the public sector under 42 U.S.C. § 1983.

In those cases, this Court and the lower courts are willing to infer an invidious motive from the fact of the disparate treatment of the individual, at least for purposes of the *prima facie* case. Because the discriminatory act is directed toward, and the injury sustained by, an individual member of a protected class, the causal connection between the effect and the motivation for it is not so tenuous as in disparate impact cases,[15] and the effect may serve as evidence of the purpose.

When, as in disparate treatment, the discrimination is directed at an individual, rather than a group, the circumstances and factors considered should be sufficiently limited in scope to permit the defendant to explain its apparently discriminatory action. The difficulty associated with refuting or explaining statistical evidence simply isn't present in discriminatory treatment cases and the opportunity to "explain" is provided for by the *McDonnell Douglas* burden-shifting analysis.

Arlington Heights is a disparate *impact* case, did not involve allegations or evidence of disparate treatment, and simply is not strictly applicable to a case where the official action is directed at an individual rather than a group and where racial discrimination can be inferred from acts directed toward the plaintiff. As such, it is not surprising that it offers no guidance as to the *prima facie* case in a disparate treatment case.

By the same token, the case below is not accurately

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[15] This frailty of statistical evidence as proof of discriminatory purpose cases is noted in *McCleskey*, as is the proposition that jury-selection and employment cases (disparate treatment cases) do not generally suffer this frailty. *McCleskey*, 481 U.S. 279, 295 n. 15.

categorized as being one of "disparate impact," as in *Washington v. Davis,* 426 U.S. 229 (1976), but one of "disparate treatment," more similar to employment discrimination cases such as *McDonnell Douglas v. Green,* 411 U.S. 792 (1973); *Burdine,* 450 U.S. 248 (1981); and *Reeves,* 530 U.S. 133. The *prima facie* case standards and burden-shifting analyses of those cases seems particularly applicable in the context of official action directed at individuals.

C. Burden Shifting

Referring to the order of proof, *Arlington Heights* provides the following:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have *shifted to the Village* the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.

Arlington Heights, 429 U.S. 252, 271 n. 21.

Obviously, then, a burden-shifting analysis is contemplated by *Arlington Heights.* A burden-shifting analysis is helpful, if not entirely necessary, to evaluate circumstantial evidence of discriminatory intent.

The question then becomes *how* does an individual plaintiff, the victim of discriminatory official action directed at him personally (rather than his minority group as a whole), prove a *prima facie* case in order to shift the burden of production to the defendant?

D. The *Prima Facie* Case

The *prima facie* case serves an important function in the litigation: it eliminates the most common non-discriminatory

reasons for the plaintiff's rejection. *Burdine*, 450 U.S. 248, 254, citing *Teamsters*, 431 U.S. 324, 358 and n. 44 (1977). As explained in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978), the *prima facie* case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Establishment of the *prima facie* case in effect creates a presumption that the defendant unlawfully discriminated against the plaintiff.

1. Employment Discrimination Cases

In employment discrimination cases, whether statutory (under Title VII) or constitutional (under § 1983),[16] the *prima facie* case is generally as follows:

(i) the plaintiff is a member of a protected class;
(ii) she was otherwise qualified for the position;
(ii) she suffered adverse employment action (termination, demotion); and
(iv) the defendant advanced (promoted, hired) a member of a non-protected class instead of the plaintiff.

McDonnell Douglas, 411 U.S. 792, 802.

In this way, the plaintiff makes the *prima facie* case of purposeful discrimination and establishes a presumption that the employer discriminated against the employee. *St. Mary's*, 509 U S. 502, 507. The burden of production of evidence, not the burden of proof, then is shifted to the defendant to articulate a legitimate, non-discriminatory reason for the disparate result. *McDonnell Douglas*, 411 U.S. 792, 802-803, *Burdine,* 450 U.S. 248, 252-253.

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[16] *See, e.g., St. Mary's*, 509 U.S. 502, 506 n.1 ("the purposeful-discrimination element of respondent's § 1983 claim against petitioner Long is the same as the purposeful-discrimination element of his Title VII claim against petitioner.").

If the defendant carries the burden of producing a legitimate, non-discriminatory reason for its actions, the presumption raised by the prima facie case is rebutted, and "drops from the case." *St. Mary's*, 509 U.S. 502, 507; *Burdine,* 450 U.S. 248, 255 and n. 10. The plaintiff then has the full and fair opportunity to demonstrate, through presentation of his own case and through *cross-examination of the defendant's witnesses*, "that the proffered reason was not the true reason for the employment decision" or was a pretext, and that race was. *Burdine,* 450 U.S. 248, 256. The plaintiff retains the ultimate burden of persuasion at all times. *St. Mary's*, 509 U.S. 502, 507; *Burdine,* 450 U.S. 248, 255.

The analysis is not "rigid, mechanized, or ritualistic," and the "specification of the prima facie proof . . . is not necessarily applicable in every respect to differing factual situations." *St. Mary's,* 509 U.S. 502, 519 and *McDonnell Douglas*, 411 U.S. 792, 801 n. 13. While these comments are addressed to varying circumstances in the Title VII or employment context, they are equally applicable to other contexts as well.

The purpose of the *prima facie* case and the consequential intermediate shifting of the burdens of production is to "sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. 248, 254 n. 8. It seems especially useful in analyzing circumstantial or indirect evidence of discriminatory purpose at intermediate stages, such as summary judgment.

2. Official Action Cases

As set forth above, other than requiring more than proof of disparate impact, *Arlington Heights* is silent as to the contours of a *prima facie* case in the context of official action. The lower courts have failed to develop any such analysis and the decision, while oft-cited, in both this Court and the lower

courts, has not been the subject of further development.

In contrast, in one species of official action case, jury selection, *prima facie* burdens have been established for some time. The former requirement of having to demonstrate the prosecution's repeated "striking" of minority jurors over a number of prior cases[17] was relaxed in *Batson v. Kentucky* , 476 U.S. 79, 80 (1986). In *Batson,* the plaintiff is permitted to establish a *prima facie* denial of equal protection through race discrimination by demonstrating that the prosecution exercised peremptory challenges to remove from the panel members or his or her race, which, together with the totality of the circumstances, operates to raise an inference of discriminatory purpose. *Batson*, 476 U.S. 79, 96. At that point, the burden shifts to the government to demonstrate a neutral explanation for exclusion of the jurors.

In so clarifying[18] the *prima facie* burden of proof in jury-selection cases, a plurality of this Court noted that *Arlington Heights* states that a "single invidiously discriminatory governmental act" is sufficient to sustain an equal protection violation and that Title VII cases permit the inference of intentional discrimination by relying solely on the facts concerning the discrimination against the plaintiff. *Batson*, 476 U.S. 79, 95-96 and nn. 18-19 (citing *Arlington Heights, McDonnell Douglas, Burdine,* and *Aikens*).

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[17] *See Swain v. Alabama*, 380 U.S. 202 (1965); *see also Alexander v. Louisiana,* 405 U.S. 625 (1972); *Akins v. Texas*, 325 U.S. 398 (1945).

[18] The Court In *Washington v. Davis* relied on the jury-selection cases, refined (some say overruled) by *Batson*, to establish the requirement of proof of purposeful discrimination to make out an equal protection violation. *Davis*, 426 U.S. 229, 239-240.

3. Comparing Official Action and Employment Discrimination Cases

There do not appear to be valid reasons for distinguishing between disparate impact cases in the official action and the employment discrimination contexts.

The central concern of the Fourteenth Amendment "was to put an end to governmental discrimination on account of race." *Batson*, 476 U.S. 79, 80 (1986), citing *Strauder v. West Virginia*, 100 U.S. 303, 306-307 (1880).

Similarly, the purpose of Title VII is "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas,* 411 U.S. 792, 800; *Griggs*, 401 U.S. 424, 429. "It is abundantly clear that Title VII tolerates no discrimination, subtle or otherwise." *McDonnell Douglas,* 411 U.S. 792, 801; *Price Waterhouse v. Hopkins*, 490 U.S. 228, 302 (1988) (O'Connor, J. concurring).

There is some burden associated with municipal and other governmental bodies having to defend claims such as Patel's. It is extremely difficult for a court to ascertain the motives, or collection of motives, behind a legislative or quasi-legislative action: it is conceivable that individual legislators or council members could give testimony, interrupting their activities and calling into question official and qualified immunity. *Arlington Heights*, 429 U.S. 252, 266, 268 and n. 18; *Palmer v. Thompson*, 403 U.S. 217, 224-225 (1971); see also *Price Waterhouse*, 490 U.S. 228, 267-279 (1988) (O'Connor, J.).

On the other hand, racial animus need not be proven to be the *sole* motivation of a legislative body to sustain a race discrimination violation of Equal Protection. *Arlington Heights*, 429 U.S. 252, 265-266. Racial discrimination is not just another competing factor for legislative bodies. *Arlington*

Heights, 429 U.S. 252, 265.

In official action discrimination, one extreme alternative is to "immunize" legislative and administrative bodies from liability for invidious discrimination entirely because of the difficulty of ascertaining legislative motive or intent and deference to their decision-making processes. On the opposite end of the spectrum, each member of such bodies could be called to testify as to his own motive and that of his or her colleagues with respect to challenged decisions and laws. Neither extreme is palatable or workable.

There are societal interests on both sides of this equation. The broad, overriding interest, seemingly shared by all fair-minded individuals and institutions, is efficient and trustworthy government assured through fair and racially neutral decisions.

The middle ground then is to clarify and adopt a variant of the *McDonnell Douglas prima facie* case and burden-shifting analysis.

Like official action, in employment discrimination cases, both statutory under Title VII and constitutionally based under § 1983, proof of disparate treatment alone is adequate to prove a *prima facie* case. *Davis*, 426 U.S. 229, 237; *St. Mary's*, 509 U.S. 502, 506 n. 1. As discussed above, the central inquiry in each "type" of case is whether racial discrimination has occurred. As long as statistical proof is not solely offered to show a diffuse impact on a group, there does not seem to be a valid reason for distinguishing between employment and official action cases.

Thus, an individual plaintiff who can demonstrate application of a statute or ordinance against him when non-minorities that are very similarly situated do not receive similar treatment, should, like the Title VII plaintiff, have established a *prima facie* case, subject to rebuttal by the defendant's proof of legitimate, non-discriminatory reasons for the disparate action.

Burdine, 450 U.S. 248, 254 (1981).

Clarifying the burden of proof of disparate treatment in the official action context conceivably could increase the number of official action discrimination cases brought.[19] Even if official action discrimination cases flourished as a result of clarifying the *prima facie* case, can it be fairly said that the nation and its courts should be more tolerant of discrimination occurring at the hands of public officials than that occurring in the private employment sector?

Official action discrimination cases are fewer and further between than employment discrimination cases, possibly because the minorities and disenfranchised are more likely to be employed and face discriminatory action from their employers than they are likely to possess property or other fundamental rights that are infringed upon by governmental entities. As minorities succeed in our society, it is conceivable and likely that they will confront more hostile governmental action as a result of their "enfranchisement." That official action discrimination claims are more rare than employment discrimination claims does not make them less important: official action discrimination, particularly in the legislative or quasi-legislative arena, smacks of "Jim Crow" and is the very *raison d'etre* of the Fourteenth Amendment and the Reconstruction Civil Rights Act. Indeed, it seems that official action discrimination cases have suffered in doctrinal development as a result of their comparative rarity.

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[19] The Shepards® service in LEXIS® shows more than 8,000 citations to *McDonnell Douglas* and approximately 3,300 to *Arlington Heights*. This would seem to indicate that employment discrimination cases are roughly twice as prevalent as official action cases.

II. This Is A Case of Disparate Treatment

A. Patel's Evidence

Patel showed disparate treatment in several ways. First, his property was demolished when the property of white owners Don Butler and Robert Trietsch, who owned nearly identical neighboring properties, was not. Patel also showed that two of his properties, which were saved from demolition by the foreclosure of Texas Bank,[20] although originally ordered demolished by the City, were not demolished once out of the hands of Patel and into the hands of the bank, and ultimately the white owner, John McKnight.[21] This evidence can be called Patel's "discriminatory treatment" evidence.

The City countered Patel's proof with various evidence tending to indicate that Patel's property was "substandard," and thus a hazard to the public. Hence, Patel's property was the target of enforcement action and demolition, while the others' property was not. Principally, in making this showing, the City relied upon its own "substandard building reports" and testimony of its "building officials," Bill Denolf and Tom Killebrew (both highly interested witnesses) to establish its defense. The City also relied on its "lengthy" and contentious "history" with Patel to demonstrate the "evenhanded" nature of its building code enforcement efforts. Conspicuously absent from the City's case was any objective evidence of the hazardous condition of Patel's property.

Patel countered this evidence with evidence of the

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[20] As soon as it became apparent that Jayanti Patel would lose his ownership interest in the property, the City consented to an injunction against demolition of this property while Texas Bank foreclosed it.

[21] Another two properties, similarly saved from demolition by the actions of a lender, were purchased by the City and demolished. The City previously agreed to an injunction against demolition of these properties to permit foreclosure by the lender, Crosslands Mortgage.

pretextual nature of the City's actions. Patel's evidence included:

- City officials ridiculing Patel's accent ("peach" roof);
- City officials referring derogatorily to "your country," and the "American way;"
- a Swastika drawn on Patel's building;
- evidence from tenants who moved from Patel's; buildings to those of white owners Butler and Trietsch that their buildings were in tangibly worse condition than Patel's;[22]
- comments from City of Everman Mayor Cathy Thurston that she would not be happy until Patel's buildings were "in the ground;"
- overcharging for and arbitrary denial of building permits, making it difficult or impossible for Patel to comply with the City's regulations.

This evidence also fits the *Arlington Heights* "sensitive inquiry" factors:

- Historical Background- Patel offered a declaration of the prior owner of his buildings, African-American male Paul McNeil to the effect that he received poor treatment at the hands of the City, which resulted in the foreclosure of the buildings by his lender;
- Specific Sequence of Events- the one-year history, including denial of permits, passage of

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[22] This and other evidence was in declaration form, some of which the City objected to on purely formal grounds (they were undated), which the trial court sustained. However, the Fifth Circuit expressly stated that it considered this evidence in affirming the district court here, so it is referred to herein as if admitted.

new ordinance, and immediate action upon expiration of the state-court injunction, and hiring of Killebrew indicate unprecedented effort on the City's behalf, directed specifically and solely at Patel;

- Departures from the Normal Procedural Sequence- the hiring of Killebrew and passage of new building ordinance apparently specifically for Patel, not as a general "beautification" campaign or even within the ordinary course of building code enforcement relying on existing ordinances and enforcement officials;
- Substantive Departures- City offered nothing but self-serving testimony and documents and no evidence that Patel's buildings were an actual hazard to the public or even the tenants in them;
- Legislative or Administrative History- contemporary derogatory and racially tinged statements of City officials are direct evidence of the City's racial animus toward Patel.

Finally but perhaps most importantly, Patel offered evidence that Killebrew dissembled on two matters. Killebrew insisted that Patel was given a warning in the form of "red tags" 30 days before his buildings were cited for demolition in substandard building reports. His testimony indicated that had Patel responded to the red tags, his buildings never would have been cited for demolition. In so testifying, Killebrew conveniently forgot or ignored his testimony that he was hired

by the City on January 22, 1998[23] and that the substandard building reports are dated February 20, 1998, *leaving less than 30 days for the alleged "red-tagging."* Killebrew also ignored the fact that the City was enjoined from taking any action against Patel until February 9, 1998, *again leaving substantially less than 30 days for the alleged "red-tagging,"* and any curative response by Patel. Indeed, fewer than 30 days elapsed between the expiration of the state-court injunction (on February 9, 1998) and the orders of demolition (on March 5, 1998).

To this same effect, Patel demonstrated that Adam Killebrew, Tom Killebrew's son, was arrested for vandalizing Patel's property by spraying green liquid and kicking holes in walls in the buildings prior to demolition. Creatively, but less than candidly, the elder Killebrew explained his son's actions as "pre-demolition work."

As noted in *Reeves*, evidence that the defendant is dissembling is powerful evidence not only that the non-discriminatory reason offered by the defendant is false, but that discrimination is the true motive:

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. [citation omitted]("Proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination"). In appropriate circumstances,

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[23] The City also offered its contract with Killebrew, actually dated in April 1998, but "effective" January 22, 1998. That contract refers to Patel's property and, conveniently (by April 1998 Patel had filed suit against the City), also to that of white owners Butler and Trietsch. No earlier version of the contract was produced or offered into evidence and no explanation for the "post-dated" contract was ever offered.

> the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." Wright v. West, 505 U.S. 277, 296, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992); see also Wilson v. United States, 162 U.S. 613, 620-621, 40 L. Ed. 1090, 16 S. Ct. 895 (1896); 2 J. Wigmore, Evidence § 278(2), p. 133 (J. Chadbourn rev. ed. 1979).

Reeves, 530 U.S. 133, 147.

Thus, Patel offered evidence, both circumstantial and direct, that he was treated differently from nearly identically situated nonminorities. He met the ***prima facie*** disparate treatment burden of *McDonnell Douglas* and its progeny. He also offered evidence in each of *Arlington Height*'s "sensitive inquiry" factors. Patel did not offer statistical proof of intent, nor did he allege discrimination by the operation of a law on a group. He alleged and offered substantial proof of the City acting against him individually in a discriminatory manner and that its purported non-discriminatory reason was pretextual.

Patel's evidence of dissembling on the part of Tom Killebrew, at the very minimum created a question of fact as to the credibility of Killebrew. Because Killebrew was the primary witness for the City and produced most of the documentary evidence relied upon by the City (the substandard building reports), raising a question about his credibility raises a question as to the credibility of the City's entire case, i.e. their legitimate non-discriminatory reason for the disparate treatment of Patel.

B. Summary Judgment Standard

A motion for summary judgment is properly granted only if there is no genuine issue as to any material fact. Rule 56 (c), Fed. R. Civ. P. (2000); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue is material if its resolution could affect the outcome of the action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus, the Court must review all of the evidence in the record, but make no credibility determinations or weigh any evidence, these are functions of the jury, not of the judge. *Anderson,* 477 U.S. 242, 255. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson,* 477 U.S. 242, 255.

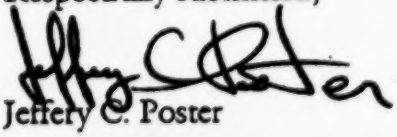
Similarly, in the burden-shifting analysis, credibility plays no role, because the burden-shifting stage precedes the credibility assessment stage. *St. Mary's*, 509 U.S. 502, 509. Accordingly, under a burden-shifting analysis as advocated herein, or even without it, Patel sustained his burden of proof for purposes of summary judgment under Rule 56 and was entitled to a full trial on the issue of purposeful discrimination at which Patel's circumstantial evidence of invidious motive could be developed and the credibility of the various witnesses and the City's non-discriminatory justification could be judged.

Because of the lack of clarity in intermediate (*prima facie*) standards of proof and shifting of burdens of production, the lower courts in Patel's case were left with an *ad hoc* and amorphous evaluation of the evidence.

CONCLUSION

The case below presents an opportunity to clarify standards applicable to cases alleging violation of the Equal Protection Clause by racial discrimination in the official action context, wherein governmental legislative, quasi-legislative, or administrative activity is at issue. The seminal case in the area, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.* does not provide a clear *prima facie* case for plaintiffs alleging disparate treatment, rather than disparate impact, at the hands of a governmental body. That case has not been revisited by the Court in nearly 25 years, nor has it evolved significantly in the lower courts. Petitioner Patel suggests that a variation of the employment discrimination case standards of *prima facie* proof and the companion intermediate burden-shifting analysis is appropriate for adoption.

Respectfully submitted,



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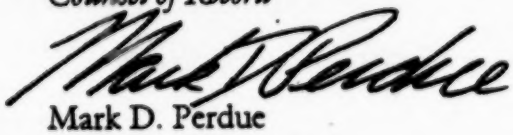
Counsel of Record



Mark D. Perdue
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Jayanti S. Patel

APPENDIX

U.S. COURT OF APPEALS
FILED
OCT 17 2001
CHARLES W. FULBRUGE III

IN THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

No. 01-10172
Summary Calendar

JAYANTI PATEL,

Plaintiff-Appellant,

versus

CITY OF EVERMAN; TOM KILLEBREW, doing business as Metro Code Analysis,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(4:99-CV-982)

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Jayanti Patel appeals from a grant of summary judgment to the defendants in this civil rights suit arising out of the demolition of buildings owned by Patel in the City of Everman for building code violations. Patel alleges that the defendants discriminated against him on the basis of his race and that his equal protection and substantive due process rights were violated. He also argues that the trial court improperly excluded evidence from consideration.

We review a District Court's grant of summary judgment *de novo* and view the evidence in the light most favorable to the nonmovant.[2] Even including the evidence that Patel argues was improperly excluded by the district court, we find that Patel has not created a genuine issue of material fact on any of his claims.[3] Patel has not produced competent summary judgment evidence to support his claim that the enforcement of the City's building codes against his property was based on racial animus.[4] Patel has also failed, as a matter of law, in his substantive due process claim because we agree with the district court that the demolition of his buildings was rationally related to a legitimate government interest

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[1] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[2] *Stucky v. City of San Antonio*, 260 F.3d 424, 429 (5th Cir. 2001).

[3] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

[4] *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

in protecting the health and safety of its citizens.[6]

For the foregoing reasons, we AFFIRM the grant of summary judgment in favor of the defendants.

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[6] *Hidden Oaks, Ltd. v. City of Austin*, 138 F.3d 1036, 1044 (5th Cir. 1998) (citing *FM Properties Operating Co. v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996)).

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
FORT WORTH DIVISION

JAYANTI PATEL,
PLAINTIFF,
VS.
CITY OF EVERMAN and TOM KILLEBREW, d/b/a METRO CODE ANALYSIS,
DEFENDANTS.
CIVIL ACTION NO. 4:99CV-982-BE

January 3, 2001, Decided
January 3, 2001, Filed

MEMORANDUM OPINION AND ORDER

Pending before the Court for determination is Defendants' Motion for Summary Judgment filed November 13, 2000. For the following reasons, the Court finds that the motion is well taken and should be granted.

A. STATEMENT OF THE CASE

Patel purchased twenty apartment buildings located in the City of Everman in Tarrant County, Texas in 1990.[1] On January 7, 1997,

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[1] The building addresses are:
403 Lee Street 408 King Street 310 N. Race Street 408 N. Race Street
403 King Street 404 Noble Street 312 N. Race Street 410 N. Race Street
404 King Street 302 N. Race Street 314 N. Race Street 412 N. Race Street
405 King Street 306 N. Race Street 402 N. Race Street 414 N. Race Street
406 King Street 308 N. Race Street 406 N. Race Street 502 N. Race Street

the City posted notices on fifteen of the buildings that the properties were considered substandard. Patel objected to the notices and was given a hearing on April 9, 1997 to discuss his properties. On April 22, 1997, the City Council issued an order for demolition of the fifteen buildings. Patel filed a suit for injunctive relief in the 48th Judicial District Court in Tarrant County, Texas. In September 1997, the state court entered an Agreed Order giving Patel six months to repair his buildings or else the buildings would be demolished.

In January 1998, the City hired Tom Killebrew to inspect Patel's properties as well as other allegedly substandard buildings in the municipality. One day after the six-month period expired, Killebrew "red-tagged" Patel's property by posting notices on all twenty of Patel's buildings indicating that they were substandard and could not be occupied. Killebrew subsequently spoke with Patel and informed him he needed to take out the necessary permits to bring the buildings into compliance. On February 20, 1998, copies of Killebrew's inspection reports for each building were sent to Patel. Patel was also notified that the City Council would hold a public hearing to consider demolition of the apartment buildings. At the hearing held March 5, 1998, Patel's attorney appeared and spoke. Nonetheless, the City's Building Board of Appeals voted unanimously in favor of demolishing each of the buildings. The City issued demolition orders on March 6, 1998

Patel filed suit in the 352nd District Court of Tarrant County, Texas on April 3, 1998 seeking to enjoin the demolition. The state court denied his request for injunctive relief on April 16, 1998 The

City proceeded to demolish all but two of the buildings,[2] asserting that it was acting under authority of its police power

Patel filed suit in the United States District Court on November 29, 1999 asserting causes of action under *42 U.S.C. § 1983* for the deprivation of the protections of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution, namely
(1) the denial of equal protection of the laws,
(2) the denial of substantive due process in voting to demolish his property, and
(3) racial discrimination because he is from India.[3]
The Defendants move for summary judgment on each of these claims.

B. STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings, depositions,

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[2] The Council initially voted in favor of granting Texas Bank, which had a lien on two of the buildings, a thirty-day period of time to make repairs, but then withdrew the extension. Texas Bank subsequently filed its own lawsuit against Patel and the City in April 1998 and obtained an injunction prohibiting demolition of the two structures in which Texas Bank has an interest. See Texas Bank v. Jayanti Patel and The City of Everman, No. 342-173247-98 (32nd Dist. Ct. Tarrant County Feb 22, 1999)(Agreed Order Granting Temporary Injunction). Apparently the two buildings that remain standing are the buildings having Texas Bank as a lienholder. It appears that those two buildings have since been sold to new owners.

[3] The court has dismissed Patel's complaints related to a taking without just compensation, allegations of denial of procedural due process, and his challenges to Section 214 001 of the Texas Local Government Code and the Everman City Ordinance as denying him a remedy or compensation for the demolition of his properties as premature.

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED.R. CIV. P. 56(c). *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986).* The court views all of the evidence and inferences therefrom in the light most favorable to the nonmovant. *Hibernia Nat'l Bank v. Carner, 997 F.2d 94, 97 (5th Cir. 1993).*

The movant bears the initial burden of showing that no genuine issue of material fact exists, but once the movant makes such a showing, the burden shifts to the nonmovant to produce competent summary judgment evidence of the existence of a genuine issue of material fact. *Anderson, 477 U.S. at 256-57, 106 S. Ct. at 2514, 91 L. Ed. 2d 202.* An issue is genuine if there is sufficient evidence for a reasonable jury to return a verdict in favor of the nonmovant. *Id. at 248, 106 S. Ct. at 2510.* A fact is material if its resolution would affect the outcome of the suit under the governing law. Id.

C. DISCUSSION

Patel contends that he has been deprived of equal protection and substantive due process as guaranteed by the Fifth and Fourteenth Amendments because the Defendants have acted arbitrarily and vexatiously with regard to his property. He complains that the Defendants randomly refused to allow him to repair his buildings, while allowing similarly situated property owners an opportunity to repair their buildings or by failing to take any action against other property owners of substandard buildings with defects equal to or worse than Patel's properties. Patel also maintains that the Defendants acted with racial animus because he is from India.

1. Equal Protection

Patel contends that the City refused to allow him the opportunity to repair his buildings while allowing similarly situated property owners an opportunity to repair or taking no action at all against other property owners with substandard buildings in the same or worse condition than Patel's. The Equal Protection Clause of the Fourteenth Amendment essentially directs that all persons similarly situated should be treated alike. *Cleburne v. Cleburne Living Center, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985).* When no suspect or quasi-suspect classification is involved, an Equal Protection claim requires only rationality review, i.e., the classification must be rationally related to a legitimate state interest. See *Texas Manufactured Housing Ass'n, Inc. v. City of Nederland, 101 F.3d 1095, 1106 (5th Cir. 1996).* Thus, Patel must establish that he was treated differently than other similarly situated parties without a reasonable basis

The documentation of conflict between Patel and the City dates back to 1995 when Patel was directed to board up his apartments because they posed a public hazard. Patel indicated that he wanted to repair the property and obtain tenants, but needed additional time to do so. The matter progressed to legal action resulting in an agreed state court judgment in 1997 that affected fifteen of the buildings and gave Patel a six-month deadline to bring his buildings into code compliance. The City subsequently retained Killebrew to evaluate the condition of Patel's buildings and other nearby properties. Killebrew found Patel's buildings failed to meet city health and safety codes. After a hearing, the City ordered demolition of the offending structures pursuant to city ordinances governing substandard housing. Patel returned to the state court, but the state court withdrew injunctive relief and the City proceeded to demolish the buildings.

The City has provided evidence from its Code Enforcement Officer that a number of other substandard residential and commercial structures have been demolished by the City during the same time frame in which Patel and the City were at odds, while other property owners rectified problems within specified time periods as directed by the City. The City has produced evidence that other properties were "red-tagged" by Killebrew at the same time Patel's properties were condemned, but these owners contacted the appropriate code enforcement officials and remedied the noted problems. Patel, however, did not contact Killebrew to obtain all of the necessary permits for repair of his buildings. Killebrew has asserted that he would have recommended a special meeting with the City Council to vacate the demolition order had Patel contacted him about making repairs and brought the properties up to code before the date scheduled for demolition. [4]

Patel has produced some evidence, mostly via information from tenants of other apartment units, that other property owners also had buildings in disrepair; however, he has not shown that these other property owners had histories of violations with the City similar to his own. Given the information available to the City at the time of demolition, there are no genuine issues of material fact regarding the rational basis for the Building Board of Appeals' vote to demolish Patel's apartment buildings as compared to the City's treatment of other property owners with substandard buildings. The City is entitled to judgment as a matter of law on Patel's Equal Protection claim.

2. Substantive Due Process

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[4] Patel notes that two of his buildings in which a local bank had an interest were not demolished; however, those two structures were protected by an injunction order issued by a state court. Accordingly, this alleged disparate treatment cannot establish an equal protection claim

Patel also complains that the City acted arbitrarily and vexatiously in randomly deciding to demolish his apartment buildings while taking no action against other property owners or allowing other property owners an opportunity to repair their buildings.[5] The Fourteenth Amendment guarantees that individuals are not to be deprived of their property without due process of law, a protection that has been viewed as guaranteeing both substantive and procedural due process Government action comports with substantive due process if the action is rationally related to a legitimate governmental interest. See *FM Prop. Operating Co. v. City of Austin, 93 F.3d 167, 174 (5th Cir.1996)*. Whether this 'rational relation' in fact exists is a question of law. *Hidden Oaks Ltd. v. City of Austin, 138 F.3d 1036, 1044 (5th Cir.1998)*. The essence of a substantive due process claim is that a decision by a governmental body is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare *Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395, 47 S. Ct. 114, 121, 71 L. Ed. 303 (U.S. 1926)*. Patel urges that the City and Killebrew have acted in such an arbitrary and capricious manner.

The Fifth Circuit has deemed a municipality's regulatory decisions regarding zoning and land use to be quasi-legislative, and accordingly, subject to deferential and limited scrutiny by the courts. *Shelton v. City of College Station, 780 F.2d 475 (5th Cir. 1986)* (en banc). Interference with the quasi-legislative action is proper only if the governing body could have had no conceivable reasons for its decision. *Id. at 483*. If the question is at least debatable, there is no denial of substantive due process as a matter of federal constitutional law. Id. This model of judicial review

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[5] Although labeled as a substantive due process claim in his First Amended Complaint. Patel appears to be reiterating his equal protection argument. (Plf. First Am. Compl. Sec. V. PC)

allows the court to hypothesize a legitimate purpose to support the municipal action. *Id. at 484.* See also *Mahone v. Addicks Util. Dist., 836 F.2d 921, 934 (5th Cir. 1988).*

The protection of residential integrity and keeping substandard housing unoccupied are legitimate, or at least debatable, governmental objectives. *Hidden Oaks Ltd. v. City of Austin, 138 F.3d 1036, 1043 (5th Cir. 1998), Jackson Court Condominiums, Inc. v. City of New Orleans, 874 F.2d 1070, 1078 (5th Cir. 1989).* Patel does not challenge the City's general right to regulate substandard housing or buildings, but instead complains that his own buildings were not in fact so substandard, when compared to other properties in the area, as to warrant application of the ordinance. But Patel has not presented competent summary judgment evidence to this court to rebut the contentious history between himself and the City regarding the condition of his apartment buildings or the reports of continuing code violations to the City's board members. The record suggests that Patel was struggling financially and attempted to repair the apartment buildings himself, but this circumstance does not render the City's vote arbitrary or irrational. Although Patel voices his own opinion that the existing violations did not pose a danger warranting demolition,[6] his evidence does not create a fact question regarding the existence of a rational relationship between a legitimate government objective and the City's

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[6] Much of Patel's response to Defendants' Motion for Summary Judgment is a reurging of his claim for compensation for the taking of his property for a public purpose. Arguments that a City has "gone too far" in the exercise of their police power invoke a Takings claim, not a substantive due process violation. See John Corp. v. City of Houston, 214 F.3d 573, 578 & n.6 (5th Cir. 2000). The actual condition of Patel's buildings and the correctness of the City Building Board's determination that the buildings posed a hazard may be relevant in the context of Patel's Takings claim and related complaints about the City's exercise of its police power, but those claims are not ripe for federal review.

enforcement of its municipal ordinance governing substandard housing. Patel's substantive due process complaints based on the City's regulation of substandard buildings are defeated as a matter of law

3. Race Discrimination

Patel also asserts that his civil right to equal protection of the laws has been violated because the City was motivated by racial animus in enforcing its otherwise neutral substandard building codes and in refusing him the same opportunity to repair his buildings that was extended to non-minority property owners. Official action will not be held unconstitutional solely because it has a racially disproportionate impact. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-65, 97 S. Ct. 555, 563, 50 L. Ed. 2d 450 (1977).* Proof of racially discriminatory intent or purpose is required. *Id. at 265, 97 S. Ct. at 563.* In making this determination, the court is guided by a non-exhaustive list of factors, including (1) the discriminatory effect of the official action, (2) the historical background of the decision, (3) the specific sequence of events leading up to the challenged decision, (4) departures from the normal procedural sequence, (5) departures from the normal substantive factors, and (6) the legislative or administrative history of the decision. *Id. at 266-268, 97* S. at Ct. 564-65.

Patel is Indian.[7] Patel and the City, however, have been embroiled

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[7] Patel has attempted to submit evidence from two former minority property owners in the City of Everman who complain of municipal harassment; however, his evidence consists of inadmissible hearsay and a written statement that fails to satisfy the requirements of 28 U.S.C. § 1746 For an unsworn declaration. Patel also argues that an unidentified city council member ridiculed his accent, but as evidence, cites to a transcript of the city council meeting that has not been properly authenticated.

in a series of disputes about the condition of his buildings in which no inference of racial animus appears, and multiple attempts were made to reach a resolution before demolition was ordered. Nor does the competent summary judgment evidence indicate that the City's Building Board of Appeals departed from its general procedures or criteria for enforcement of the City's substandard building ordinance.

In his affidavit, Patel recounts a conversation with the new City Code Inspector Bill Denolf in November 1997 in which Denolf refused to issue him a Certificate of Occupancy for one of his units because there was no door knob on the exterior door. Patel challenged the deficiency because, despite having no door knob, he did have a lock with a working handle. Denolf responded that it might be "the way they do it in your country, but they do not do it that way here." (Plf. App., Ex. B. p. 133). Patel has not raised a fact question regarding Denolf's enforcement of the building codes, even if Denolf phrased his findings in an insensitive manner

Patel further attempts to raise an inference of racial discrimination because a swastika was painted on the interior wall of one of his apartment units But the swastika is of unknown origin, and there is no competent evidence that the graffiti was sanctioned by or can be attributed to the City or Killebrew. [8] Patel also notes that the City Planning and Zoning Board and the Board of Appeals have no minority members, but the lack of minority membership on the Building Board is too speculative in character to raise a material fact

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[8] Patel also suggests that City employees vandalized his property by breaking windows and spray-painting the walls; however, his evidence indicates that the acts he considers vandalism occurred after the City voted for demolition and at or near the time the property was being prepared for demolition

question about the Board's racial animosity towards Patel.

The City has produced evidence of its evenhanded enforcement of its ordinances against minority and non-minority property owners with buildings in disrepair. For example, on the same day he posted notices on Patel's buildings. Killebrew also posted notices of code violations on neighboring apartment buildings belonging to persons who are not members of a racially suspect class. But there is no competent evidence that these non-minority landowners had the same history of noncompliance as Patel or were given additional opportunities or preferential treatment to avoid demolition of their respective properties. To the contrary, these owners apparently contacted Killebrew or the City and timely obtained the necessary permits to repair their properties, while Patel did not. The court fails to perceive enough evidence to create a fact issue that the Board or Killebrew pursued or favored the demolition of Patel's buildings, even in part, because of his race as opposed to the health, safety or general welfare of the public.

It is ORDERED that Defendant's Motion for Summary Judgment is granted.

SIGNED JANUARY 3, 2001

CHARLES BLEIL

UNITED STATES MAGISTRATE JUDGE

Amendment XIV, Section 1, United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Title 42, United States Code, Section 1983:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rule 56, Federal Rules of Civil Procedure:

Rule 56. Summary Judgment

(a) For Claimant.
A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party.
A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.
The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion.
If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the

court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required.
Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable.
Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by

affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith.
Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Supreme Court, U.S.
FILED
FEB 21 2002
CLERK

(2)

No. 01-1065

IN THE

Supreme Court of the United States

JAYANTI S. PATEL,

Petitioner,

v.

THE CITY OF EVERMAN and TOM KILLEBREW,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether proof that an Indian-American individual's buildings were ordered demolished pursuant to a facially neutral ordinance, while buildings owned by Caucasians were not, without direct or circumstantial evidence of discriminatory intent, is sufficient to show a violation of the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the lower courts properly applied *Arlington Heights* to Petitioner's case claims.

3. Whether this Court has sufficiently defined the burden for demonstrating a violation of the Equal Protection Clause of the Fourteenth Amendment in an "official action" case.

4. Whether the burden-shifting paradigm defined in *McDonnell Douglas v. Green*, for Title VII employment discrimination cases based upon circumstantial evidence, should be applied to "official action" cases.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the Petition for Writ Certiorari. The lower courts properly applied *Arlington Heights* to the facts at bar. More specifically, *Arlington Heights* sufficiently addresses a plaintiff's burden for demonstrating violations of the Equal Protection Clause of the Fourteenth Amendment. The holding in *Arlington Heights* is squarely in accord with Supreme Court and court of appeals precedent regarding non-employment invidious discrimination claims pursuant to the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF JURISDICTION

Although this Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1254(1), it should not exercise such jurisdiction because Petitioner alleges only that the lower courts misapplied a properly stated rule of law.

STATEMENT OF THE CASE

Petitioner owned twenty (20) properties in the Willow Wood Apartments Complex in the City of Everman, County of Tarrant, Texas. On April 9, 1997, the City of Everman Planning & Zoning Commission held public hearings on fifteen (15) rental properties owned by Petitioner and ordered the demolition of the buildings. On April 22, 1997, the Everman City Council held a Special Meeting to hear an Appeal of the Order to demolish Petitioner's structures. After examining the evidence and hearing testimony from Petitioner, the City Council unanimously passed a resolution accepting the Planning and Zoning Commission's recommendation to demolish fifteen (15) of the apartment buildings owned by Petitioner. Thereafter, Petitioner filed

Jayanti Patel v. City of Everman, Cause No. 48-169805-97, in the 48th Judicial District Court, Tarrant County, Texas. On September 17, 1997, the Court, in that action, entered an Agreed Order, signed by and agreed to by the parties, requiring Petitioner to bring fifteen (15) apartment buildings into compliance with all city codes of the City of Everman. The Agreed Order enjoined the City from demolishing any of the buildings until February 9, 1998. After the expiration of the Agreed Order, the City was allowed to demolish the apartment buildings without further court action.

On or about January 22, 1998, Respondent City employed the services of Respondent Killebrew, a Certified Building Official and owner of Metro Code Analysis, to address the substandard condition of the subject properties owned by Petitioner. At the time of the hiring of Killebrew, Respondent City did not have a Certified Building Official on its regular staff. On or about February 5, 1998, Respondent City enacted an amended Substandard Building Ordinance, which provided for a Building Board of Appeals and updated procedures for addressing substandard structures, as authorized by Texas Local Government Code § 214.001 *et seq*. Thereafter, in January 1998, Respondent Killebrew viewed Petitioner's properties and issued notices identifying violations of the Building, Mechanical, and Electrical Codes. Subsequent to this notice, Respondent Killebrew informed Petitioner during a telephone conversation that he would need to come to the City and take out permits for the necessary work to bring the subject properties into compliance. Petitioner never took these steps.

On or about February 20, 1998, Respondent Killebrew, accompanied by the City's Code Enforcement Officer and Chief of Police, performed an inspection of the twenty (20) subject properties and found that Petitioner's properties were

substandard under the City of Everman Code. Respondent Killebrew prepared inspection report for each property detailing the substandard conditions and provided Petitioner with copies of said reports. On or about February 20, 1998, Respondent City notified Petitioner of a public hearing before the Building Board of Appeals concerning the continuing substandard condition of all twenty (20) apartment buildings and the right to demolish the buildings if there are still code infractions after February 9, 1998 pursuant to the Agreed Order in *Jayanti Patel v. City of Everman*, Cause No. 48-169805-97. Respondent City emphasized that by holding said hearings, it was not waiving the right to enforce its rights under the Agreed Order signed by the parties.

On March 5, 1998, Respondent City held separate Building Board of Appeals hearings regarding each of the twenty (20) apartment buildings. Petitioner, and his attorney attended only three (3) of the twenty (20) hearings and did not present: (a) evidence demonstrating that Petitioner had abated the code violations at issue; (b) photographs reflecting the condition of Petitioner's properties at issue; (c) diagrams or charts reflecting the condition of Petitioner's properties; (d) evidence demonstrating that Petitioner had a plan to abate the code violations in questions; (e) witnesses to testify regarding the condition of Petitioner's properties; or (f) evidence concerning the apartment buildings' condition. On or about March 6, 1998, the Building Board of Appeals issued orders for the demolition of Petitioner's buildings. Notably, although Respondent Killebrew recommended that Petitioner's buildings should be demolished, only the Building Board of appeals had the authority to issue an order to demolish Petitioner's substandard buildings.

On or about April 3, 1998, Petitioner filed *Jayanti Patel v City of Everman*, Cause No. 352-173265-98, in the 352nd Judicial District Court, Tarrant County, Texas. In this action, Petitioner sought to enjoin the City from demolishing the subject buildings. On or about April 16, 1998, the 352nd Judicial District Court, after a hearing, entered an Order denying the Petitioner's Motion for Temporary Injunction, clearing the way for demolition of the subject properties. Thereafter, Respondent City commenced the demolition of eighteen (18) of the twenty (20) apartment units. On or about July 23, 1999, Petitioner's Cause No. 352-173265-98 in the 352nd Judicial District Court was non-suited by Petitioner on the day scheduled for trial.

On or about November 29, 1999, Petitioner filed Cause No. 4:99-CV-0982-BE in the United States District Court for the Northern District against Defendants City, Killebrew, (Respondents herein) and Metro Code Analysis asserting causes of action under 42 U.S.C. § 1983 for the deprivation of the protections of Fourth, Fifth and Fourteenth Amendments of the United States Constitution. On or about January 3, 2001, the United States District Court granted Summary Judgment in favor of Defendants City and Killebrew, who are Respondents herein, and issued final judgment regarding Petitioner's claims against Defendants. On or about October 22, 2001, the United States Court of Appeals for the Fifth Circuit affirmed the United States District Court's decision to grant Respondent City's summary judgment regarding Petitioner's claims.

SUMMARY OF ARGUMENT

The case at bar surrounds Petitioner's allegations of discrimination based on national origin. More specifically, Petitioner alleges that Respondents took the "official action"

of demolishing Petitioner's buildings because of his Indian origin and that said action violated his rights under the Equal Protection Clause of the Fourteenth Amendment. Importantly, this Court has consistently held that a plaintiff must make some showing of discriminatory intent or purpose to succeed with a discrimination claim under the Equal Protection Clause. Thus, a plaintiff must demonstrate, through direct and/or circumstantial evidence, an intent to discriminate against a suspect class to establish a violation of the Equal Protection Clause. A mere showing that a protected-class individual is subject to a different "official action" than a Caucasian individual, without direct or circumstantial evidence of discriminatory intent, is never sufficient to demonstrate a violation of the Equal Protection Clause of the Fourteenth Amendment.

Petitioner argues that the lower courts inappropriately considered *Arlington Heights* because said case fails to: (1) distinguish between allegations of disparate treatment and disparate impact; and (2) define a *prima facie* case for discrimination under the Equal Protection Clause. As referenced above, this Court's precedent does not recognize "disparate impact" claims under the Equal Protection Clause; therefore, there was no need for the *Arlington Heights* court to distinguish said claims from "disparate treatment" claims. Moreover, referencing the need for either direct or circumstantial evidence, *Arlington Heights* sufficiently defines the burden for a plaintiff to prove an invidious discrimination case under the Equal Protection Clause of the Fourteenth Amendment and outlines various "*prima facie*" factors the lower courts may consider in determining whether a violation of the Equal Protection Clause has occurred. Although decided in 1976, *Arlington*

Heights is good law and has been consistently applied to "official action" claims of discrimination under the Equal Protection Clause of the Fourteenth Amendment.

Petitioner further argues that the burden-shifting framework defined in *McDonnell Douglas v. Green* for Title VII employment discrimination cases should be applied to Petitioner's "official action" discrimination claim. Due to the different purposes behind Title VII and the Equal Protection Clause of the Fourteenth Amendment, the analysis used for Title VII employment discrimination cases is inappropriate for "official action" claims of discrimination. Furthermore, this Court has never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable in Title VII.

Notwithstanding, even under *McDonnell Douglas v. Green*, a plaintiff always has the burden of demonstrating that discriminatory intent was the reason for a defendant's actions. Petitioner argues that if the lower courts had applied the burden-shifting paradigm defined in *McDonnell Douglas v. Green*, Petitioner would have had the opportunity to develop fully his circumstantial evidence of discriminatory motive and to test the credibility of the City's non-discriminatory motive. Simply stated, that would not be the result of applying *McDonnell Douglas v. Green* to the facts at bar. Specifically, all employment discrimination precedent emphasizes that the burden to show discriminatory intent always remains with the plaintiff. Even in the context of summary judgment, it is a plaintiff's burden to show that the legitimate non-discriminatory reasons offered by a defendant for its actions are pretext for protected-class discrimination.

Thus, Petitioner's assumption is misplaced and Petitioner's claim would have failed even applying *McDonnell Douglas v. Green*.

REASONS FOR DENYING THE WRIT

I. The Difference Between the Claims under Title VII and the Equal Protection Clause

Petitioner mischaracterizes and misplaces the foundation of "disparate treatment" cases and "disparate impact" cases. Although the Title VII "disparate treatment" and "disparate impact" theories of discrimination are inapplicable to a claim of discrimination under the Equal Protection Clause, an understanding of the two (2) theories is helpful in analyzing the issues raised in Petitioner's Petition for Writ of Certiorari.

A. Employment Discrimination Claims pursuant to Title VII

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 91 S. Ct. 849, 853 (1971). Pursuant to the language of Title VII, there are two (2) types of employment discrimination cases. More specifically, Title VII prohibits an employer from: (1) failing or refusing to hire, or discharging any individual, or discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such an individual's race, color, religion, sex or national origin; and (2) limiting, segregating or classifying his employees or

applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of the individual's race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e-2(a)(1) and (2). Accordingly, there are two (2) theories by which a complainant can prove an employment discrimination claim under Title VII.[1] The two theories being: disparate treatment and disparate impact.

1. Disparate Impact Cases: No Showing of Intent Required

As noted above, Title VII prohibits the implementation of procedures, practices, tests, or standards that have a discriminatory effect on protected classes. *See Griggs*, 401 U.S. at 429-30, 91 S. Ct. at 853. Claims based on said facts have been defined as "disparate impact" claims. Such claims are generally based on standards that appear to be neutral on their face, but that by their very institution have a discriminatory effect on employment opportunities for protected-class members. *See Griggs*, 401 U.S. at 429-30, 91 S. Ct. at 853. Generally, "disparate impact" cases deal with the effects of a neutral standard on a large group of protected-class members. A disparate impact case does not require a showing of discriminatory intent; therefore, with sufficient proof, an individual can prove a discriminatory impact case without providing any evidence of discriminatory motive or intent. *See Griggs*, 401 U.S. 424, 91 S. Ct. 849.

To establish a *prima facie* case of "disparate impact" discrimination, a plaintiff need only show that the facially

1. Title VII also prohibits retaliation against any individual that attempts or asserts his rights under Title VII. These cases are known as Title VII retaliation cases. 42 U.S.C. § 2000e-3(a).

neutral practice causes a disparate impact on the basis of a suspect class. *Griggs*, 401 U.S. at 431-33, 91 S. Ct at 853. Once it is shown that the standards are discriminatory in effect, the employer show that the employment standard has a manifest relationship to the employment in question. If the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also serve the employer's legitimate interest in efficient and trustworthy workmanship. *See* 42 U.S.C. § 2000e-2(k)(1); *see Griggs*, 401 U.S. at 433, 91 S. Ct. at 855; *Dothard v. Rawlinson*, 433 U.S. 321, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (1977).

2. Disparate Treatment Cases: A Showing of Intent Required

Clearly, Title VII prohibits employment actions, such as hiring, firing, demoting or promoting, based on race, color, sex, religion, or national origin. *See* 42 U.S.C. § 2000e-2(a)(1). Allegations of intentional discrimination based on a protected class are referred to as "disparate treatment" claims. Disparate treatment cases require a showing of discriminatory intent through either direct or circumstantial evidence. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

There are two ways to prove a disparate treatment case, through circumstantial evidence and through direct evidence. The type of evidence offered by a plaintiff dictates the burden of proof for said case. Notably, to prove a disparate treatment case, it will never suffice to merely provide evidence that a

protected class member was treated differently than a non-protected class member. This is not sufficient because there is a plethora of reasons why two persons may not be treated the same; the case law defines a more reliable approach for determining whether intentional discrimination has occurred.

If a plaintiff attempts to offer direct evidence of discrimination to prove a "disparate treatment" case under Title VII, the plaintiff must provide sufficient evidence to show that a discriminatory motive played a role in the adverse employment action in question. *See* 42 U.S.C. § 2000e-2(m). If a plaintiff meets this burden, an employer can avoid damages at law by showing that he or she would have taken the same action despite the discriminatory motive. *See* 42 U.S.C. § 2000e-5(g)(2)(B). Without a showing of discriminatory motive or intent, a plaintiff cannot succeed in a "disparate treatment" case.

If a plaintiff offers only circumstantial evidence to prove a "disparate treatment" claim, the burden-shifting paradigm defined in *McDonnell Douglas v. Green* is applicable.[2] The elements of a plaintiff's *prima facie* case necessarily vary according to the facts of the case and the nature of the claim. *McDonnell Douglas*, 411 U.S. at 802, 935 S. Ct. at 1824. Notwithstanding, generally, to prove a *prima facie* case of discrimination through circumstantial evidence, a plaintiff must show: (1) he is a member of a protected class; (2) he has qualified for the position in question; (3) despite his qualifications, he was rejected; and (3) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant qualification. *McDonnell Douglas v. Green*, 411 U.S. at 802,

2. 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973).

93 S. Ct. at 1824. Importantly, a similar burden-shifting analysis is applied in adverse employment action cases, involving suspensions, terminations, demotions and the like. Once the plaintiff establishes a *prima facie* case of discrimination, the burden of production shifts to the employer to articulate legitimate, non-discriminatory reasons for the employment decisions at issue. *Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094. If the employer proffers a legitimate, non-discriminatory reasons for its actions, the presumption of unlawful discrimination, created by the plaintiff's *prima facie* case, disappears. *See St. Mary's Honor Center*, 509 U.S. at 506-07, 113 S. Ct. at 2747. Thus, if the defendant has met its burden of production, "the *McDonnell Douglas* framework with its presumptions and burdens – is no longer relevant." *St. Mary's Honor Center*, 509 U.S. at 521, 113 S. Ct. at 2755. Thereafter, the plaintiff must prove that the employer's articulated reasons are a mere pretext for unlawful discrimination. *McDonnell Douglas*, 411 U.S. at 802-05, 93 S. Ct. at 1824-26; *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2112 (2000). Importantly, the plaintiff retains the ultimate burden of persuasion throughout the case, and must show the employer intentionally discriminated against him. *Reeves*, 120 S. Ct. at 2106 (quoting *Burdine*, 450 U.S. at 253); *St. Mary's Honor Center*, 509 U.S. at 515. If that were not the case, any time a Hispanic or African-American employee was fired while a Caucasian employee was not, for whatever reason, one could demonstrate a *prima facie* case of employment discrimination. Such a result would burden and overwhelm the courts with litigation.

B. Discrimination Claims pursuant to the Equal Protection Clause of the Fourteenth Amendment

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminatory on the basis of a suspect class. *See Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040, 2047 (1976). "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person with its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216, 12 S. Ct. 2382, 2394, 72 L. Ed. 2d 786 (1982)). Although the purposes behind Title VII and the Equal Protection Clause of the Fourteenth Amendment are similar, they are not the same.

First, there is no protection under the Equal Protection Clause for discriminatory effects of a particular law or action. *See Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S. Ct. 2282 (1979); *Washington v. Davis*, 426 U.S. at 239, 96 S. Ct. at 2047. The Equal Protection Clause of the Fourteenth Amendment provides for equal protection of the laws not equal results. *Feeney*, 442 U.S. at 273, 99 S. Ct. at 2293. Thus, the current case law does not provide for a cause of action for mere discriminatory effects of a particular action or law in the context of claims based on constitutional violations. *See Feeney*, 442 U.S. 256, 99 S. Ct. 2282; *Washington*, 426 U.S. at 239, 96 S. Ct. at 2047; *Wright v. Rockefeller*, 376 U.S. 52, 84 S. Ct. 603, 11 L. Ed. 512 (1964); *Akins v. State of Texas*, 325 U.S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692 (1945). Impact may provide a

starting point, but "purposeful discrimination is the condition that offends the Constitution." *See Feeney*, 442 U.S. at 274, 99 S. Ct. at 2293.

To demonstrate a violation of the Equal Protection Clause, a plaintiff must show that the "decision-maker selected or reaffirmed a particular course of action at least, in part, 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." *See Feeney*, 442 U.S. at 279, 99 S. Ct. at 2296 (citation omitted); *McClesky v. Kemp*, 481 U.S. 279, 298, 107 S. Ct. 1756, 1770 (1987). Thus, if a suspect classification is not at issue, some showing of a discriminatory purpose toward a suspect class is required. "To hold otherwise, would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be." *Davis*, 426 U.S. at 240-41, 96 S. Ct. at 2048. Accordingly, Equal Protection Claims are similar to Title VII "disparate treatment" cases only to the extent that the both require a showing of discriminatory intent via direct or circumstantial evidence.

Moreover, unlike employment decisions, the reasons for an "official action" decision are generally privileged and the decision-maker(s) does not have an opportunity to explain their reasons for decision. *See United States v. Morgan*, 313 U.S. 409, 422 (1991); *United States v. Nixon*, 418 U.S. 683, 705, 94 S. Ct. 309, 3106 (1974); *Teeney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951). An analysis under Title VII "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed." *Davis*, 426 U.S.

at 247-48, 96 S. Ct. at 2051. Specifically, one should not be given an opportunity to probe into the minds of administrators, legislators, or quasi-judicial fact finders unless the decision is shown to be arbitrary or irrational. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555 (1977). Accordingly, unlike personnel decisions that are clearly subject to judicial injury, there is a threshold one must meet before being permitted to question the decision-makers about the reasons for an "official action." Moreover, a plaintiff must demonstrate discriminatory purpose or intent to succeed with an Equal Protection Clause claim. As will be discussed below, the burden-shifting paradigm defined in *McDonnell v. Douglas* for employment discrimination cases based upon circumstantial evidence only is not a sufficient standard for demonstrating an invidious discrimination claim under the Equal Protection Clause.

II. *Arlington Heights* provides sufficient guidance for evaluating Equal Protection claims involving non-employment cases such as "official action" claims.

Petitioner argues that his buildings were demolished because of his national origin, Indian. Petitioner concedes that the ordinance upon which the Building Board of Appeals relied when ordering the demolition of his buildings is facially neutral. Petitioner argues that the case at bar is a "disparate treatment" claim under the Equal Protection Clause. As noted above, there is not a "disparate treatment" claim per se under the Equal Protection Clause.

A. *Arlington Heights:* Facts and Holding

Contrary to Petitioner's interpretation, *Arlington Heights* is not a "disparate impact" case. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555 (1977). Although the *Arlington Heights* plaintiffs pointed to evidence demonstrating that more suspect-class individuals would be affected by the "official action" in question, said plaintiffs did not allege that the facially neutral zoning law in question had a discriminatory impact on persons of a protected class. Moreover, there is no "disparate impact" claim per se under the Equal Protection Clause because a mere showing of the discriminatory effects of a particular action or law is insufficient to successfully prove a violation of the Equal Protection Clause.

In *Arlington Heights*, the plaintiffs below applied to the Village of Arlington Heights ("VILLAGE") for the rezoning of a 15-acre parcel from single-family to multiple-family classification. The Village denied the rezoning request and the plaintiffs filed suit alleging that the denial was racially discriminatory and that it violated, *inter alia*, the equal Protection Clause. Following a bench trial, the district court entered judgment for the Village and the Plaintiffs appealed. The Court of Appeals for the Seventh Circuit reversed, finding that the "ultimate effect" of the denial was racially discriminatory, and that the refusal to rezone therefore violated the Fourteenth Amendment. *Village of Arlington Heights*, 429 U.S. 254, 97 S. Ct. at 558. This Court granted the Village's petition for certiorari and reversed the lower court's finding.

In *Arlington Heights*, the Court considered whether evidence showing that an "official action" had a greater

impact on protected-class individual is sufficient to prove a violation of the Equal Protection Clause. In arriving to its decision, the United States Supreme Court emphasized the holding in *Washington v. Davis* which made it clear that an "official action" will not be held unconstitutional solely because it results in a racially disproportionate impact. The Court emphasized that "[d]isproportionate impact is not irrelevant, but is not the sole touchstone of an ambiguous rational discrimination." *Village of Arlington Heights*, 429 U.S. at 264-65, 97 S. Ct. at 563. Moreover, the Court explained that because legislators and administrators are properly concerned with balancing numerous competing considerations, the courts refrain from reviewing the merits of the decisions, absence a showing of arbitrariness or irrationality. *Village of Arlington Heights*, 429 U.S. at 265, 97 S. Ct. at 563. "But rational discrimination is just not another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Village of Arlington Heights*, 429 U.S. at 265-66, 97 S. Ct. at 563. In summary, the Court held that the plaintiffs failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision. Moreover, the Court accentuated that a finding that the Village's decision resulted in a discriminatory "ultimate effect" is without independent Constitutional significance. *Village of Arlington Heights*, 429 U.S. at 270-71, 97 S. Ct. at 566.

B. *Arlington Heights* sufficiently defines a *prima facie* case and burden-shifting paradigm

This Court in *Arlington Heights* sufficiently defined a *prima facie* case and burden-shifting paradigm to be used for evaluating claims under the Equal Clause of the

Fourteenth Amendment. In fact, Petitioner relied on *Arlington Heights* below. In *Arlington Heights*, the Court suggests that when determining whether invidious discriminatory purpose was a motivating factor, the lower courts must demand "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available". *Village of Arlington Heights*, 429 U.S. at 266, 97 S. Ct at 564. By using the conjunctive, the Court is clear that a finding can be based on either type of evidence when said evidence is available. The Court noted that the impact of the official action whether it bears more heavily on one race than the other may provide an important starting point.

Furthermore, the Court, defined various "*prima facie*" factors that lower courts may consider in determining whether invidious discrimination has occurred in violation of the Equal Protection Clause. More specifically, the Court explained that the Court can look to the following evidence: (1) the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes; (2) the specific sequence of events leading up to the challenge decision; (3) departures from the normal procedural sequence; and (4) the legislative or administrative history regarding the official decision at issue. *Village of Arlington Heights*, 429 U.S. at 267-68, 97 S. Ct. at 564-65. The Court further explained that if a plaintiff carries the burden to demonstrate some evidence, direct or circumstantial, indicating that discriminatory purpose was a motivating factor in the official decision, the burden would shift to the defendant to establish that the same decision would have resulted even if the impermissible purpose not been considered. *Village of Arlington Heights*, 429 U.S. at 268, 97 S. Ct at 564-65 (citing *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

C. Applying the burden-shifting paradigm defined in *Arlington Heights*, Petitioner has no remedy under the law

As noted above, the *Arlington Heights* Court defined various *prima facie* factors and a burden-shifting paradigm to be used in evaluating Equal Protection Claims under the Fourteenth Amendment claims. Thus, the lower courts properly applied *Arlington Heights* to the case at bar. Applying said factors, the lower courts did not find that Petitioner had established any evidence of a discriminatory intent on the part of the Respondents. See Petitioner's Appendix pgs. A1-A14. Petitioner argues that the very fact that he was treated differently than other individuals who were Caucasian should be sufficient evidence to demonstrate a violation of the Fourteenth Amendment. Clearly, said evidence is not sufficient evidence to prove a claim pursuant to the Equal Protection Clause or Title VII. Considering the evidence provided by Petitioner and the factors defined in *Arlington Heights*, the Petitioner has no remedy at law because he can not prove that discriminatory motive or intent was the reason, or even a motivating factor, for the City of Everman Building Board of Appeals' decision to demolish his properties.

As the lower court below noted, Petitioner and Respondents had years of disputes regarding the substandard condition of Petitioners buildings in which no reference or indication of rational animus appeared. Additionally, the evidence demonstrates that many attempts were made to reach a resolution before demolition of buildings was ordered. Finally, there was no evidence the City's Building Board of Appeals departed from its general procedures for enforcement of the City's Ordinance. Of all the evidence provided by

Petitioner, none is sufficient to establish that discriminatory motive or intent played a role in the decision to demolish Petitioner's property. Moreover, the lower courts properly relied upon *Arlington Heights* in reaching their decisions.

III. The burden-shifting paradigm defined in *McDonnell Douglas v. Green* for Title VII employment discrimination cases is inappropriate for cases involving allegations of discrimination with regard to "official actions"

Although the *McDonnell Douglas* paradigm provides for a presumption of discrimination after proof of a *prima facie* case, the ultimate burden remains with the plaintiff to show that intentional discrimination was reason for the employment action at issue. "The *McDonnell Douglas* presumption is a procedural device, designed only to establish an order of proof and production." *St. Mary's Honor Center*, 509, U.S. at 521, 113 S. Ct. at 2755. "Although intermediate evidentiary burdens shift back and forth under said framework, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Reeves*, 530, U.S. at 143, 120 S. Ct. at 2106 (internal questions omitted). In the "official action" case at bar, the *McDonnell Douglas* framework is inappropriate for official action cases because it is nothing more than an allocation of order of proofs and burdens for Title VII cases. Moreover, it is not necessary given the elaborate framework defined for "official action" cases in *Arlington Heights*.

Petitioner argues that if the *McDonnell Douglas* burden-shifter paradigm had been applied to his claim, he would have had the opportunity to test the credibility of the

Respondents' reasons for their actions and would have had a chance to develop a showing of pretext. Clearly, it would have been Petitioner's burden, even at the summary judgment stage, to ultimately persuade the Court that intentional discrimination was the reason for the demolition of Petitioner's buildings. *Anderson v. Liberty Lobby, Inc.*, 477U.S. 242, 252 (1986). Accordingly, Petitioner would still have had to show Respondents City and Killebrew acted with the intent to discriminate on the basis of Petitioner's national origin.

Finally, Petitioner argues that he provided evidence of pretext when he demonstrated that Respondent Killebrew was not credible and/or that the reasons provided by Respondent Killebrew were false. Importantly, this Court has consistently emphasized that the under the *McDonnell Douglas* burden-shifting framework only the burden of **production** shifts the defendant to articulate a legitimate non-discriminatory reason for its action. This Court has stated that "the determination that a defendant has met its burden of persuasion (and has thus rebutted an illegal presumption of intentional discrimination) can involve no credibility assessment." *St. Mary's Honor Center*, 509 U.S. at 509, 113 S. Ct. at 2748. Accordingly, Petitioner's arguments fail, that is "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination . . ." *Reeves*, 530 U.S. at 147, 120 S. Ct. at 2108. Moreover, the evidence provided by Petitioner regarding "pretext" refers to alleged actions by Respondent Killebrew. Importantly, as noted above, Respondent Killebrew, as the City's Building Official, merely recommended the demolition of Petitioner's buildings. Specifically, the City of Everman Building Board of Appeals is the only entity with the authority to issue an order regarding

the demolition of Petitioner's buildings. According, assuming the allegations provided by Petitioner are correct, they bid no support to an argument that the Building Board of Appeals issued the orders of demolition due to Petitioner's national origin. Therefore, even under the *McDonnell Douglas* framework, Petitioner has no legal remedy at law and has not survived the burden established under the employment discrimination context.

Finally, this Court has never applied the Title VII analysis to constitutional violations and should not do so now. *Washington*, 426 U.S. at 239, 96 S. Ct. at 2047. As explained above, this Court has sufficient defined a burden-shifting approach and various factors for evaluating alleged constitutional violations. There is no need to provide additional explanation for the purposes of Petitioner's claim.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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